

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

SHELDON SMITH,

Petitioner, : Case No. 3:13-cv-330

- vs -

District Judge Thomas M. Rose
Magistrate Judge Michael R. Merz

WARDEN, Chillicothe Correctional
Institution,

Respondent.

DECISION AND ORDER DENYING RECONSIDERATION

This case is before the Court on Petitioner's Motion Requesting Reconsideration of Report and Recommendation [sic] as Pre-Mature (Doc. Nos. 35 & 42¹).

Smith argues the Report and Recommendations are premature because the Court has not yet considered the evidence added to the record pursuant to the Magistrate Judge's Decision and Order Granting Smith's Motion to Expand the Record (Doc. No. 32). In that Decision the Magistrate Judge ordered the record expanded to include a recording actually listened to by Judge Wolaver of the Greene County Common Pleas Court in deciding this case, noting that this expansion would not violate the rule in *Cullen v. Pinholster*, 563 U.S. ___, 131 S. Ct. 1388 (2011). Respondent has not objected to that Decision and Mr. O'Brien has filed the recording as a transcript (Doc. No. 34). It remains for Petitioner to file any additional memorandum he wishes the Court to consider in support of his Motion to Amend to add a claim relative to *Franks*

¹ The Motion was originally filed *pro se* by Petitioner and stricken because he was then represented by counsel. After Mr. O'Brien moved to withdraw (Doc. No. 38), he re-filed the document on behalf of Petitioner.

v. Delaware, 438 U.S. 154 (1978); the Decision sets a deadline of December 1, 2014, for that memorandum (Doc. No. 32, PageID 1181.)

The Court acknowledges that this case is not yet ripe for final determination because Smith's *Franks* claim has not yet been added, much less decided. No final judgment should be filed until that claim is disposed of. But that claim is not included in the claims dealt with in the pending Report and Recommendations (Doc. No. 33). The Report deals only with Grounds for Relief One and Two as pled in the Petition. Because those Grounds for Relief were fully ripe at the time the Report was filed, it was in no sense premature.

The Motion for reconsideration based on prematurity is DENIED.

December 1, 2014.

s/ ***Michael R. Merz***
United States Magistrate Judge